UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NATIONAL NURSES ORGANIZING COMMITTEE/NATIONAL NURSES UNITED (NNOC/NNU), AFL-CIO	)	
Charging Party,	)	**Case No.: 05-CA-182154** **05-CA-187452**
And	)	
HOLY CROSS HEALTH, INC. D/B/A HOLY CROSS HOSPITAL	)	
Respondent.	)	

RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION AND STATEMENT OF THE CASE

On February 27, 2017, the Counsel for the General Counsel ("General Counsel") issued a Complaint and Notice of Hearing on charges filed by the National Nurses Organizing Committee/National Nurses United ("Union"). The charges alleged that the Hospital violated Section 8(a)(1) of the National Labor Relations Act ("Act"). There are no allegations of discrimination or adverse employment actions. This matter was heard on May 18, 19 and 23, 2017 before Administrative Law Judge ("ALJ") Michael A. Rosas in Baltimore, Maryland.

On July 11, 2017, the Parties submitted their post-hearing briefs.[1] On July 14, the General Counsel filed a Motion to Strike Portions of Respondent's brief. On July 17, *four business days* after the submission of the Parties' lengthy briefs, the ALJ responded that "the briefs and [sic] have been considered and decision is essentially completed" and denied the General Counsel's Motion to Strike. Exhibit A. On July 21, the ALJ issued his decision finding in favor of the Union on every allegation. It is evident from the numerous factual and legal errors that the ALJ improperly rushed this decision and did not review the transcript of record and the briefs of the parties. This "rush to judgment" resulted in erroneous substantial findings of fact and conclusions of law. The following summarizes some of the errors to which the Hospital has excepted.

The ALJ erred in concluding that Hospital's Non-Solicitation and Distribution Policy ("Policy") and October 7, 2016 Memorandum titled "Solicitation on Nursing Units" ("Memo") were unlawfully vague and created confusion among nurses. Specifically, the ALJ wrongfully concluded that that Policy unlawfully prohibited nurses from discussing the Union in nursing stations, corridors, stairwells, elevators, and immediate patient care areas. Uncontradicted record

[1] The Hospital submitted a 49 page post-hearing brief. The General Counsel submitted a 69 page post-hearing brief. The Union submitted a 29 page post-hearing brief.

evidence shows that the nurses understand that discussion of the Union is permitted in all areas and at all times as long as it does not interfere with patient care, and that they have engaged in such discussions in all areas of the Hospital. Tr. 103:18-104:9; 182:3-6; 193:13-194:4; 296:24-299:21; 305:20-23; 316:14-317:6; 342:6-19; 343:22-344:13. This common understanding is based upon the Policy's legitimate business purpose – to prevent disruption to patient care – and how the Hospital has applied the Policy. GC Ex. 2-3. The ALJ failed to address the Hospital's defense that its Policy and Memo were lawful as communicated and applied. *See infra* at 23-28.

The ALJ also erred in concluding that the Policy unlawfully prohibited the nurses from using the Hospital's email system during nonworking time. GC Ex. 2. The Hospital rebutted the presumption that its Policy interfered with or restrained protected activity by showing that it did not enforce the Policy. The ALJ's finding that the Hospital did not clarify its facially unlawful Policy is at odds with the Chief Nursing Officer's written statement (which the ALJ improperly discounted in contravention of Board precedent) and with the nurses' own admissions at trial that they frequently used the email system to discuss and solicit for the Union. *See infra* at 28-30.

The ALJ erred in concluding that Director Cynthia Hawley unlawfully threatened and interrogated Susannah Reed-McCullough on July 21, 2016. The ALJ's conclusion that Ms. Hawley made unlawful threats is based on his erred finding of fact that Ms. Reed-McCullough was an open union supporter. No record evidence supports this finding. *See infra* at 31-35.

Ms. Hawley's statements as described by the General Counsel's own witness were lawful because they are not threats. The statements at issue are: "there wasn't a huge difference being in a unionized hospital versus a non-unionized hospital as far as like staffing and nurse satisfaction goes" and "there could be some changes that people might like with the Union, and there could be some changes that people might not like." Tr. 120. The ALJ's conclusion that

Ms. Hawley engaged in interrogation is also flawed because there is no record evidence that Ms. Hawley encouraged Ms. Reed-McCullough to disclose the identity of co-workers who supported the Union or her own views on the union. *See infra* at 35.

The ALJ erroneously concluded that the security officers' brief exchange with off-duty nurses constituted coercive interference of union activity on August 6, 2016. The sole case cited by the ALJ, *Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach and Hotel Renew,* 365 NLRB No. 53 (2017), as the legal predicate for his conclusion of law, does not support that conclusion. The facts of *Aqua-Aston* are so far afield from Hospital's security officers' actions on the August 6 incident that the case actually supports the Hospital's position. *See infra* at 36-40.

The ALJ erred in concluding that Nurse in Charge Jolly Joseph's photographing of nurses engaged in union activity was unlawful. The nurses who were photographed, published and widely disseminated the same photographs immediately after the activity. There is ample record evidence that Ms. Joseph's photos had no effect on the Union supporters or intimidated any nurse and that Ms. Joseph did not realize that she was photographing the public union event. *See infra* at 40-43.

The ALJ erroneously concluded that Nursing Director Mariamma Ninan unlawfully threatened Vera Ngezem on September 21, 2016. Even if Board law requires an explicit reference to the collective-bargaining process during a discussion about working conditions,[2] the ALJ ignored the fact that Ms. Ninan stated that changes were dependent on what is negotiated in a contract. Tr. 406:17-407:4; 407:23-408:7; 409:13-17. The ALJ also failed to consider that Ms. Ninan distributed Fact Sheet 10 entitled "What is Collective Bargaining?" that explains how

[2] The Hospital's position is that a reference to the collective bargaining process is not required where the employer makes clear that change working conditions "may" happen, not "will happen." *See infra* at 32-33.

terms and conditions of employment may change when subject to the collective-bargaining process around the same time that she met with Ms. Ngezem. *See infra* at 43-46.

The ALJ erroneously concluded that Security Officer Lawrence Hawkins' brief exchange with nurses, without any direction to cease activity or having the effect of ceasing activity, constituted coercive interference and interrogation on October 19, 2016. The ALJ cites to a single case, *St. Johns' Health Center*, 357 NLRB 2078 (2011), to support his decision. In that case, two security officers interrupted distribution of literature and threatened prosecution for trespass if they continued distribution. 357 NLRB 2078 (2011). These facts do not support a finding of violation in the present case. *See infra* at 46-47.

Each of the above erred findings and conclusions that the Hospital engaged in conduct prohibited by the Act are independent bases for overturning the decision. Accordingly, the Hospital respectfully requests that the National Labor Relations Board ("Board") overrule the ALJ's Decision as described herein.

II. ISSUES FOR REVIEW

The Hospital has excepted to the ALJ's findings and conclusions of law. *See* Respondent's Exceptions. Each Exception is incorporated in this Brief. The specific issues for review are:

1. The ALJ erred in concluding that the Hospital's Non-Solicitation Policy and October 7 Memorandum unlawfully prohibited discussion about the Union despite uncontradicted evidence that nurses understood the Hospital to permit such discussions and the nurses routinely engaged in such discussion without consequence. (Exception Nos. 1-2, 5-6, 8-9)

2. The ALJ erred in concluding that the Hospital's Non-Solicitation Policy unlawfully prohibited nurses from utilizing the Hospital's electronic systems, including email, to solicit and discuss the Union despite uncontradicted evidence that the Hospital clearly communicated to all nurses that they could use email to discuss the Union and nurses openly and frequently engaged in such discussions over Hospital email. (Exception Nos. 1-4, 8)

3. The ALJ erred in concluding that the Hospital failed to establish that corridors, elevators and stairways used by or to transport patients are patient care areas. (Exception Nos. 1-2, 7-8)

4. The ALJ erred in concluding that Cynthia Hawley unlawfully threatened and interrogated Susannah Reed-McCullough on July 20, 2016. (Exception Nos. 10-12)

5. The ALJ erred in applying *Aqua-Aston Hospitality,* 365 NLRB No. 53 (2017) and in concluding that Hospital security officers coercively interfered with nurses' union activities on August 6, 2016 and also erred in concluding that Officer Hawkins interfered with nurses' union activities by making a passing comment which did not interrupt those activities. (Exception Nos. 13-16)

6. The ALJ erred in concluding that Jolly Joseph's photographing of nurses engaged in union activity where the union published and widely disseminated the same photographs immediately after the event constitutes surveillance or an impression of surveillance on September 16, 2016. (Exception No. 17)

7. The ALJ erred in concluding that Mariamma Ninan unlawfully threatened Vera Ngezem on September 21, 2016. (Exception Nos. 18-21)

8. The ALJ erred in applying *St. Johns' Health Center*, 357 NLRB 2078 (2011) and concluding that Security Officer Lawrence Hawkins coercively interfered with nurses' union activities on October 19, 2016. (Exception Nos. 22-23)

III. STATEMENT OF FACTS

A. The Hospital's Operations.

The Hospital is an acute care hospital located in Silver Spring, Maryland on the Washington D.C. beltway. GC Ex. 1(m). The Hospital provides inpatient and outpatient medical care to the greater Washington, D.C. metro area population and has significantly high patient volume. *Id.* The Hospital employs approximately 1,300 registered nurses. Tr. 39:9-10.

In late June 2016, the Hospital became aware that the Union was attempting to gain representation rights for its registered nurses. Jt. Ex. 1.

B. Hospital Policies at Issue – The Non-Solicitation and Distribution Policy and October 7 Memorandum

The Hospital re-issued its Non-Solicitation and Distribution Policy ("Policy") on June 8, 2016 prior to having any knowledge of Union activity. GC Ex. 2. There is no evidence in the record that the Hospital was aware of the presence of union activity on June 8. Four months later, on October 7, 2016, the Hospital distributed by email a Memorandum titled "Solicitation on Nursing Units" ("Memo") to all nurses. GC Ex. 3.

Throughout the entire 11-month period from the issuance of those documents until the Hearing, the Hospital had not criticized, counseled or disciplined any nurse for discussing the Union, soliciting on behalf or against the Union or distributing literature in support of or against the Union. Tr. 100:3-6, 192:11-14; 299:18-21; 344:14-345:9. There is record evidence that there were a substantial number of conversations between and among nurses about the Union throughout the period between the re-issuance of the Policy and the date of the Hearing. Tr. 103:18-104:9; 182:3-6; 193:13-194:4; 296:24-35; 297:1-299:21; 305:20-23; 316:14-317:6; 342:6-19; 343:22-344:13. There is no record evidence that any of the terms that the General Counsel has labeled vague has in fact chilled the exercise of Section 7 rights.

1. The Definition of "Solicitations" and "Discussions"

The ALJ found that the Hospital's definition of "solicitation" in its Policy and Memo is overbroad because it includes "promoting, encouraging, or discouraging participation, support, or membership in any organization; or promoting of a doctrine or belief" and that "an employee would reasonably be led to believe that she cannot discuss the Union during work time or in patient care areas, even though she can discuss other non-work topics in those areas." JD 14:40-15:23; GC Ex. 2. The evidence establishes otherwise. Prior to and since June 2016, the Hospital has permitted nurses to have non-work related discussions, including discussions about the

Union, in all areas of the Hospital, including nurses' stations, corridors, elevators, stairwells and lounges as long as those discussions do not interfere with patient care. Tr. 96:6-10; 182:3-6; 193:13-194:4; 305:20-23; 342:6-19. Despite the Hospital's Policy and Memo, nurses know, as evidenced by the General Counsel's witnesses' testimony, that the Hospital permits discussion about the Union in all areas of the Hospital as long as it does not interfere with patient care. *Id.*

General Counsel witness and registered nurse Vera Ngezem testified that she discussed the Union with a nurse named Demaris Collins at a nurses' station, and then another nurse provided Ms. Collins with information about the Union in the break room. Tr. 193:13-194:4. Ms. Ngezem also testified that she has discussed the Union in the corridors of the unit. Tr. 182:3-6. General Counsel witnesses and registered nurses Jeaneen ("Nina") Scott and Marianne Wysong testified that they discussed the Union with nurses at nurses' stations. Tr. 305:20-23; 342:6-19.

The Hospital also permits nurses to travel to other units to solicit nurses and discuss the Union as long as it does not interfere with patient care. Tr. 96:6-10. Ms. Scott testified that, since January 2016 to May 2017, she continuously discussed the Union with nurses in other units, that those conversations took place in various areas of the Hospital including in nurses' lounges on units, the cafeteria, outside the cafeteria, in corridors, in stairways, in the parking lot, and in the lobby, without any consequence or discipline from Hospital management. Tr. 296:24-35; 297:1-22; 298:9-19; 299:8-21. Ms. Scott testified that she spoke to nurses about the Union in lounges "on the South building, to the 4th floor, 5th floor, [and] 6th floor." Tr. 316:14-317:6.

The General Counsel failed to present any evidence that any nurse was hesitant or restricted from discussing the Union when it did not interfere with patient care. Likewise, there

is no evidence in the record that nurses were confused about whether they could discuss the Union during working time.

2. Use Of The Hospital's Email System

The ALJ concluded that the Policy's prohibition of the use of the Hospital's email system to engage in discussion and solicitation violates the Act despite the Hospital's communication to all nurses that it does not enforce the Policy. JD 16:31-17:30. Chief Nursing Officer Celia Guarino clarified the policy in an email to *all* nurses that the Hospital permitted discussion about the Union over the Hospital email system:

> Holy Cross has done what most employers don't do, and made it's [sic] email system and distribution list available to all nurses so they can exchange ideas and thoughts, whether they or [sic] for or against the union or not.

R Ex. 1 (*see* HCH000561). It is uncontradicted that many nurses openly and frequently used the Hospital's email system to advocate for or against the Union. R Ex. 1; Tr. 103:18-104:9. Respondent's Exhibit 1, which is a mere sampling of the countless emails sent to the list serve[3] received by all nurses, shows that thirteen nurses – not a select few – openly discussed the Union. R Ex. 1; Tr. 220:11-17. Members of management were also sending and receiving these emails including Ms. Guarino and Senior Nursing Director Nancy Nagel. R Ex. 1.

Nurses used the list serve to send emails discussing the Union so frequently that many nurses requested to be removed from the list to avoid receiving the emails. *Id.* (HCH000552). The Hospital did not remove any nurses from the list serve. *Id.* (HCH000561).

The General Counsel failed to present any evidence that any nurse was hesitant or restricted from using the Hospital's email system to discuss the Union.

[3] The email list serve contains a list of all of the registered nurses' email addresses.

3. Immediate Patient Care Areas

In the Policy and Memo, the Hospital prohibits solicitation and distribution in immediate patient care areas. GC Ex. 2-3. The ALJ found that the Hospital's definition of "immediate patient care areas" to be impermissibly overbroad because it includes "patient lounges, waiting areas, corridors, sitting rooms, elevators, stairways, or 'areas on the unit where patients are or can be present.'" JD 18:6-10; GC Ex. 2-3. This is contrary to record evidence that patients are frequently present in the corridors for treatment-related purposes, including for transport to other units and in units where patients ambulate through the units. Tr. 104:25-105:10; 180:17-22; 181:9-15. Moreover, there is uncontradicted evidence that nurses also place patients in the corridor near the nurses' station where they can closely monitor a confused patient. Tr. 180:9-16. Patients also frequently use or are transported in the elevators throughout the Hospital. Tr. 105:11-13. Finally, there is uncontradicted evidence that outpatients who are coming to or from the Hospital for treatment also may be present in the stairways. Tr. 105:14-20.

The ALJ ignored the Memo clarification about patient care areas that provides:

> **<u>Immediate patient care areas</u>** include:
> …
> - *Hallways and Corridors on the units- if a patient is present in hallway (for example, patients walk in hallways for rehabilitation or exercise, being transported, etc.) then it is a patient care area.*
> - *Elevators and stairways used by or to transport patients*

GC Ex. 3. (Emphasis added).

4. Lack of Evidence Of Interference With Section 7 Activities

The record does not contain any evidence that there were substantial and recurring questions by and among nurses about what actions nurses could take under the Policy and the Memo. There is no testimony that any agent of the Hospital prevented a nurse or Union agent from discussing the Union, soliciting on its behalf or distributing literature, but there is abundant

and uncontradicted testimony that nurses have continuously engaged in all of those activities. R Ex. 1; Tr. 94:14-95:7; 103:2-17; 149:14-22; 182:3-6; 193:13-194:4; 267:7-9; 296:24-35; 297:1-22; 298:9-19; 299:8-21; 305:20-23; 307:4-308:25; 342:6-19; 343:22-344:13.

C. July 20, 2016 – NICU – Ms. Hawley's Conversation With Ms. Reed-McCullough

The ALJ concluded that Cynthia Hawley, a Nursing Director in the Neo-Natal Intensive Care Unit ("NICU"), threatened Ms. Reed-McCullough with more onerous working conditions and loss of benefits and interrogated her about her union activities. JD 19:18-34; 21:43-22:15.

Ms. Reed-McCullough was the only witness called on this claim. On July 20, 2016, Ms. Hawley asked NICU registered nurse Susannah Reed-McCullough to come to her office to have a conversation. Tr. 118:25-199:4. Ms. Reed-McCullough has worked in the NICU since 2011, and throughout her tenure in the NICU, Ms. Hawley has been her supervisor.[4] Tr. 117:13-20. Ms. Reed-McCullough texted some of her nursing colleagues and Union organizers that Ms. Hawley had approached her to have a conversation. Tr. 119:9-16.

The conversation took place in Ms. Hawley's office with the door open and lasted only a few minutes. Tr. 120:1-4. Ms. Reed-McCullough testified that Ms. Hawley informed her that the Hospital had become aware of Union organizing among the nurses, and advised Ms. Reed-McCullough that she should inform herself with information before making any decisions about the Union. Tr. 120:4-14. Ms. Reed-McCullough testified that Ms. Hawley stated that if Ms. Reed-McCullough were ever to feel as though she was being harassed by the Union, that she can let Ms. Hawley know. *Id.*; JD 21:45. Ms. Hawley never asked Ms. Reed-McCullough any direct or indirect questions about her involvement in the Union or asked her to identify other employees who may or were in support of the Union. Tr. 122:1-7.

[4] Ms. Hawley was on leave at the time of the Hearing. Tr. 117:9-10.

Ms. Hawley then discussed her personal and her daughters' experiences working in a union environment, and that, in her opinion, "there wasn't a huge difference being in a unionized hospital versus a non-unionized hospital as far as like staffing and nurse satisfaction goes." Tr. 120:15-19. Ms. Reed-McCullough testified that Ms. Hawley mentioned that there could be some changes that people might like with the Union, and there could be some changes that people might not like. Tr. 120:19-121:22. Finally, Ms. Reed-McCullough testified that Ms. Hawley stated that "a big thing with unions … was that everything kind of has to be equal across the board, so there *might* be some things that we enjoyed having on our unit that *could* change." Tr. 120:19-25. (Emphasis supplied). For example, Ms. Hawley stated that "our self-scheduling *could* be subject to change" and that "our current FMLA policy … *could* be subject to change" but was not specific as to how. Tr. 121:1-2; 11-13. (Emphasis supplied).

There is no evidence in the record that Ms. Hawley knew Ms. Reed-McCullough's position on the Union.

Significantly, Ms. Reed-McCullough testified that:

> 16 Q. BY MS. LEYH: Isn't it true that nothing that you just
> 17 testified about made you think that Ms. Hawley would
> 18 retaliate against you if you voted for the Union?
> 19 A. Yeah, I didn't, I didn't get the sense from her that it
> 20 was as a threat of retaliation.

Tr. 129:16-20. The above is the totality of the evidence as to the allegation concerning Ms. Hawley. The General Counsel did not call any other witness to testify as to this claim.

D. August 6, 2016 – 5 South - Security Officers' Interaction with Off-Duty Nurses

On August 6, 2016 around 3 p.m., off-duty NICU nurses Jeaneen ("Nina") Scott and Suzanne Mintz came to the Hospital to speak with nurses about the Union organizing effort. R. Ex. 32; Tr. 58:2-14; 262:11-13. Both Ms. Scott and Ms. Mintz wore plain clothes. R. Ex. 32;

Tr. 67:15-18. Ms. Scott and Ms. Mintz first went to the South Tower building, a separate part of the Hospital from the NICU, and spoke with a registered nurse, Ester, on the 6th Floor ("6 South") about the Union without any interference. Tr. 58:15-61:5; 262:16-263:16.

At 3:18:42 p.m., Ms. Scott and Ms. Mintz traveled down to the 5th Floor ("5 South," a closed General Surgery unit) to speak with registered nurse Aieun "Grace" Yu, who Ms. Mintz had been acquainted with. R. Ex. 32; Tr. 61:5-62:2; 134:4-5; 263:19-23. Ms. Scott and Ms. Mintz asked the Health Unit Coordinator ("HUC") to speak with Ms. Yu, briefly entered the locked unit, and then decided to wait outside the unit in the waiting area. Tr. 61:24-63:8; 97:5-98:23; 263:21-264:22. At 3:20:50 p.m., Ms. Scott and Ms. Mintz returned to the waiting area. R. Ex. 32.

Around this time, Nurse in Charge ("NIC")[5] Dwight Lyles, was making rounds and returned to the nurses' station, which is his work station. Tr. 447:24-25. Mr. Lyles saw the two individuals in the waiting area, but did not recognize Ms. Mintz as a nurse and did not see her Hospital ID badge. Tr. 452:3-6. Mr. Lyles saw that Ms. Scott wore a badge and recognized her to be a nurse. Tr. 451:24-452:2; 11-24. Mr. Lyles called the administrative coordinator Carrie Weakland and then security to notify them that off-duty nurses were attempting to pull an on-duty nurse off the unit and away from her patients. Tr. 450:9-25.

At 3:23:18 p.m., Ms. Yu, who was on duty, left the unit to meet with Ms. Scott and Ms. Mintz in the waiting area. R. Ex. 32; Tr. 453:10-20; 456:1-3.

At 3:24:08 p.m., Ms. Yu returned to the unit after agreeing to send another nurse, NeNe, off the unit to speak with them about the Union. R. Ex. 32; Tr. 64:3-7; 16-20; 135:1-7. At this time, Ms. Scott and Ms. Mintz suddenly made sure that they were wearing their Hospital ID

[5] The Parties stipulated that NICs are supervisors within the meaning of Section 2(11) under the Act. Jt. Ex. 1.

badges, and situated the badges so that they were visible to onlookers. R. Ex. 32. They obviously took these actions to make sure that they could show they were off duty employees who were in compliance with what they understood to be the Hospital's policy on solicitation.

At 3:34:52 p.m., Ester from 6 South came downstairs and again met with Ms. Scott and Ms. Mintz for six or seven minutes. R. Ex. 32; Tr. 64:20-65:16; 266:20-25. There is no evidence that the Hospital interfered with or prevented that meeting.

At 3:40:39 p.m., Ester was still meeting with Ms. Scott and Ms. Mintz when Security Officers Daniel Webster and Kelley Varnado responded to the call on 5 South.[6] R. Ex. 32; Tr. 477:3-6. The officers did not make any statements to the nurses at that time, did not approach them or observe them and walked to the nurses' station on the unit leaving the three nurses to their conversation. R. Ex. 32.

The Union seemed to argue that the number of security officers present implied a threat. Tr. 496:7-497:19. However the evidence is uncontradicted that it is normal procedure for two or more officers to respond to a call that reports more than one person being involved for the purposes of officer safety. Tr. 479:23-480:6. The officers never know what they will encounter when responding to a call, so if possible, more than one officer will respond. *Id.* Officers Webster and Varnado exited the elevators on 5 South, observed Ms. Scott and Ms. Mintz sitting in the waiting area, and immediately walked towards the nurses' station at the front of the unit.[7] R. Ex. 32; Tr. 66:9-20; 477:8-10. Officers Webster and Varnado asked Mr. Lyles why he called. Tr. 477:14-20. Mr. Lyles responded that off-duty nurses were speaking to his on duty nurse about the Union. *Id.* At 3:41:41 p.m., Officer Webster returned to the waiting area and approached Ms. Scott and Ms. Mintz. R. Ex. 32. At this time, Officer Lawrence Hawkins, who

[6] The security officers are agents of the Hospital within the meaning of Section 2(13) of the Act. Jt. Ex. 1.
[7] Ester exited via the elevators at 3:41:43 p.m. after the security officers responded to the call. R. Ex. 32.

was patrolling the area and not responding to the call, coincidentally exited the elevator. *Id.*; Tr. 479:15-16; 497:1-2; 501:12-13. Officer Hawkins then continued on his patrol. R. Ex. 32. Officer Webster approached Ms. Mintz and Ms. Scott and asked what they were doing. *Id.*; Tr. 477:23-25. Ms. Scott and Ms. Mintz responded that they were visiting a friend. Tr. 478:1-2. Officer Webster replied "Ok" and asked for their names because he routinely writes down the names of individuals who he interacts with when responding to a call in his notepad for purposes of making a report. R. Ex. 28; Tr. 67:8-14; 485:12-20; 478:4-11. At no point in the exchange did Ms. Mintz and Ms. Scott state that they were engaging in Union activity, and Officer Webster never questioned them about Union activity. Tr.477:21-479:8.

Less than a minute later, at 3:42:29 p.m., Officer Webster returned to the unit to speak with Mr. Lyles and Ms. Yu. R. Ex. 32; Tr. 478:13-479:1. Officer Webster asked Ms. Yu if she knew Ms. Mintz or Ms. Scott, and Ms. Yu denied knowing either nurse, which Officer Webster found odd since Ms. Mintz had referred to Ms. Yu as her friend. Tr. 478:13-479:1. Officer Webster also wrote down Mr. Lyles' and Ms. Yu's names. *Id.*; Tr. 67:4-8; 457:1-8.

At that point, Officer Webster determined that there was no need for Officer Varnado to be present and sent him on other duties. Tr. 497:11-19; 504:19-24. At 3:43:35 p.m., Officer Webster returned to the waiting area and asked for Ms. Mintz's last name because she had only given him her first name and her Hospital badge did not contain her last name. R. Ex. 32; Tr. 479:2-6. This exchange lasted twenty seconds, and there was no discussion about why the nurse were present in the waiting area or whether they were there on behalf of the Union. R. Ex. 32.

Immediately after, at 3:43:54 p.m., Officer Webster left the unit. R. Ex. 32; Tr. 67:19-20; 479:7-11. Officer Webster never instructed Ms. Scott and Ms. Mintz that they were doing anything wrong. He never instructed them to leave the unit or prohibited them from meeting

with nurses. Tr. 99:12-14. The security officers' presence in the immediate area of the nurses was mere seconds. There is no evidence that Officer Webster issued any instructions to cease activity or leave the area to Ms. Scott or Ms. Mintz whatsoever, nor did he give any indication that the Hospital was surveilling their activity. Ms. Scott and Ms. Mintz stayed in the waiting area for about ten minutes without interference or interruption, and no one from the Hospital approached them. Tr. 67:21-68:2; 69:9-10; 269:6-8.

At 3:53:10 p.m., Ms. Scott and Ms. Mintz exited 5 South via the elevator and went down to the Starbucks in the main Hospital lobby, where they continued their activity. Tr. 69:14-23; 270:9-10. They met with Ester and collected a union authorization card from her without any interference. *Id.* Ms. Scott and Ms. Mintz later voluntarily left the Hospital on a time of their own selection. Tr. 69:14-70:5. Security officers never instructed them to leave the lobby area near Starbucks, and the officers never encountered them in or around Starbucks. Tr. 99:20-24; 481:2-10.

After August 6, no one from Hospital management counseled, disciplined, or even spoke to Ms. Mintz, Ms. Scott, or Ms. Yu about the incident. Tr. 99:25-100:11. Ms. Mintz and Ms. Scott did not file any complaint[8] with the Hospital concerning this incident; nor did they ask for any clarification of the whether the Hospital permitted them to visit nurses on other units. There was no question because Ms. Scott and Ms. Mintz knew that they could take those actions and they testified that they continued to visit with nurses on other units while they were off duty after August 6. Tr. 92:11-93:6; 100:15-18; 256:7-12. They also went to other units *many times*, while on shift, for purposes of talking to nurses about the Union. Tr. 94:6-95:7; Tr. 256:7-12.

[8] Ms. Scott knew that she could file a complaint with Human Resources because she later filed one on March 21, 2017. Tr. 319:14-15.

After Officer Hawkins left the waiting area on 5 South, he continued his patrol of the area. GC Ex. 18; Tr. 482:19-483:1; 501:12-17. During his patrol, Officer Hawkins encountered nurses in the hallway and overheard them laughing and state "Let me see what they are offering" to which Officer Hawkins jokingly responded, "yeah, I want to hear too." *Id.* Officer Hawkins and the nurses laughed and he kept walking on his patrol. Tr. 501:12-17. No further exchanges took place. GC Ex. 18. The ALJ concluded that Hawkins's brief comment was an unlawful interference. JD 25:20-23. The General Counsel did not call any witnesses.

E. September 16, 2016 - Ms. Joseph And Other NICs' Photographs

On September 16, 2016, NIC Jolly Joseph attended a management training for NICs in a conference room on the first floor of the Hospital. Tr. 365:11-366:4. Ms. Joseph currently works as a NIC in 5 East and 5 West, and has worked at the Hospital for at least 27 years. Tr. 362:18-363:6. In the conference room, there are windows that look out into the side parking lot where a statue is located. Tr. 365:11-366:4.

During a break in training, the NICs noticed nurses congregating in the side parking lot and watched from the window. Tr. 367:20-23; 390:9-20. Ms. Joseph observed what she thought to be a professional photographer taking photographs of the nurses who were posing in front of the statue. Tr. 368:1-8. Ms. Joseph thought it was a professional photographer because the person used a large camera and wore street clothes, unlike the scrubs that the nurses wore. Tr. 391:2-392:10. Ms. Joseph did not know why the nurses were posing and thought that the nurses were celebrating or having an awards ceremony. Tr. 368:17-18; 389:14-20. Ms. Joseph noticed that the nurses were holding a banner, but she could not read the banner as it was 20-30 feet away. Tr. 371:14-20. Ms. Joseph also could not see the nurses' faces well enough to recognize anyone. Tr. 370:10-16.

Ms. Joseph took three photographs on her cell phone of what she thought was a celebration. R. Ex. 13-15. Ms. Joseph enjoys taking photographs and always takes pictures on her cell phone of nurses when they have get-togethers or celebrations at work. Tr. 371:23-24; 372:13-15; 389:16-20. After Ms. Joseph took the photos, she realized that the gathering of nurses was related to the Union. Tr. 289:16-20. She also realized that she recognized one of the nurses to be Vera Ngezem, who worked on her unit, and a nurse named Gisele, who had previously worked on her unit but since transferred. Tr. 371:3-4; 375:18-20.

Ms. Joseph sent the pictures to her Director Mariamma Ninan in a text message. GC Ex. 16. Ms. Joseph texted the photographs to Ms. Ninan because, during the prior night shift on September 15, Gisele had visited the night staff on their unit. Tr. 377:23-380:1; 423:22-25. Ms. Ninan and Ms. Joseph thought it was odd that Gisele was on the unit because they had not seen her since she transferred to Maternity Suites. *Id.* After Ms. Joseph saw Gisele in the photograph, she texted Ms. Ninan to say that they assumed correctly that Gisele was visiting the unit to talk about the Union with other nurses. *Id.*

Two other NICs, who Ms. Joseph did not know, later used Ms. Joseph's cell phone to text message the pictures to their cell phones. R. Ex. 17-18; Tr. 381:25-383:9. The two NICs also texted the photographs to other managers. R. Ex. 19-22.

Meanwhile, the nurses in the parking lot observed nurses in blue scrubs in the conference room through the window. Tr. 156:9-25. The nurses in the parking lot did not recognize the nurses to be management because they wore blue scrubs. Tr. 157:1-3. Emboldened by and responding to their audience, the nurses raised their arms and cheered and smiled at those in the conference room. GC Ex. 13-15; R. Ex. 15; Tr. 158:10-13. This reaction made it obvious that the nurses were not intimidated by the NICs in the conference room. *Id.* After Ms. Ngezem

observed camera flashes coming from inside the conference room, she rejoined the group of nurses. Tr. 189:20-191:16. Ms. Ngezem was also smiling and laughing like many of the other nurses. *Id.*; Tr. 210:6-18. The nurses had planned to distribute their picture in a Union flyer throughout the Hospital and by email that same day and that management would see it. Tr. 149:23-150:4; 151:7-10; 151:25-152:2. The nurses made no effort to shield their identities. GC Ex. 13-15. After posing for their picture, the nurses marched inside the Hospital as a group holding their banner, walked down a main corridor on the First Floor, through the front lobby, up the elevator and into Administration on the Fourth Floor to present their banner to CEO Dr. Norvell Coots. Tr. 158:20-159:15; 191:18-192:3.

Almost immediately after the nurses posed for photographs in front of the statue, the Union published a flyer with a colored photograph of the nurses posing in front of the statue with their banner. GC Ex. 8. The nurses who appeared in the photographs taken by Ms. Joseph also appeared in the Union's photograph on the flyer. GC Ex. 8; 13-15. The pro-union nurses widely disseminated this flyer throughout the Hospital so that both nurses and management saw the flyer. Tr. 419:12-420:7.

F. September 21, 2016 - Ms. Ninan's Discussion with Ms. Ngezem

The ALJ found that Mariamma Ninan, a Nursing Director on 5 East and 5 West units, unlawfully threatened registered nurse Vera Ngezem with more onerous working conditions and loss of benefits. JD 20:6-11.

Ms. Ninan has worked at the Hospital for ten years, but has been a nurse for 30 years. Tr. 403:8-9; 404:13-14. Ms. Ninan supervises about 85 employees, of which 65 are nurses, on 5 East and 5 West. Tr. 403:15-404:4. Ms. Ngezem is a full-time registered nurse who works the night shift on 5 East. Tr. 405:6-13; 146:19-22. Ms. Ninan has supervised and worked with Ms.

Ngezem for almost 1.5 years, and they have shared an amicable working relationship during that time. JD 12:9-11; Tr. 147:12-25. Ms. Ninan regularly meets with Ms. Ngezem at the 7:00 a.m. huddles, during monthly staff meetings, and in one-on-one meetings. Tr. 434:1-13.

In or around July 2016, Ms. Ninan became aware that Union organizing was taking place in the Hospital. Tr. 442:11-17. In or around September 2016, Ms. Ninan distributed Fact Sheets 8 and 10 to the nurses on her unit, and discussed how scheduling may change if a contract is in place. R. Ex. 23-24; Tr. 187:3-24.

Fact Sheet 8 provides information about the flexibility that employees currently enjoy compared to how that flexibility may change in accordance with the contract rules. R. Ex. 23.

Fact Sheet 10 entitled "What is 'Collective Bargaining?'", which was distributed on or around September 19, 2016, provides information about how terms and conditions of employment may change in the collective-bargaining process:

> There are no guarantees: … [of] what will be in the final contract. You could wind up with more, the same, or less than you have now.
> …
> Collective bargaining is a one-size fits all approach. The agreement negotiated is on behalf of all nurses and may limit manager flexibility on such issues as holiday assignments, extending vacation requests and limiting overtime.

R. Ex. 24.

Ms. Ninan had conversations with several nurses who needed personal accommodations when it came to scheduling – for example, they could only work Saturdays or certain days because they were in school or cared for elderly parents or children – and discussed how the current scheduling process may change if a contract is in place. Tr. 410:25-411:13.

Among these nurses, Ms. Ninan had a conversation with Ms. Ngezem. Tr. 405:25-406:3. On September 16, Ms. Ninan became aware of Ms. Ngezem's support of the Union after she saw Ms. Ngezem's photograph on a Union flyer and received a text message from Ms. Joseph that

showed Ms. Ngezem was outside with other nurses supporting the Union. Tr. 405:14-24, 424-425; GC Ex. 8.

On September 21, 2016, after Fact Sheet 10 was distributed, Ms. Ninan and Ms. Ngezem had a conversation in Ms. Ninan's office. Tr. 405:25-406:3. Ms. Ninan discussed the reality that the scheduling process may change in accordance to the rules of a contract because Ms. Ngezem always had special scheduling requests that the unit had routinely accommodated. Tr. 406:5-16. For example, after being hired, Ms. Ngezem requested that she not work Saturdays. *Id.*; Tr. 410:14-23; 165:13-20. This is a special request because all of the full-time nurses on the unit are required to work every other weekend. Tr. 406:5-16.

The conversation between Ms. Ninan and Ms. Ngezem took place in Ms. Ninan's office with the door open and lasted about fifteen minutes. Tr. 409:23-410:10; 164:12-13. Ms. Ninan informed Ms. Ngezem that the flexibility in scheduling could change if a contract was in place – hence referencing the collective-bargaining process:

> ***If there was ever a contract*** by the Union, there may be possibility of changing that self-scheduling ***to what contract may be negotiated***. That could include every other weekend.

Tr. 406:17-21. (Emphasis added). Ms. Ninan also generally discussed that if a Union represents the nurses, vacation benefits may change depending on what is negotiated:

> Right now what we have is vacations are approved first-come, first-serve basis. So I remember vaguely talking about seniority when it comes to vacations approval ***if we ever have a contract***.

Tr. 406:25-407:4; *see also* 431:2-4. (Emphasis added). Ms. Ninan also shared her personal experiences working in a union environment. Tr. 407:23-408:7; 162:16-15. Ms. Ninan shared that her family friend, who was in a union, was denied vacation time due to her lack of seniority:

> A family friend … was trying to get a vacation, particularly for her child's christening in June, and [] unfortunately was not able to get it because of seniority. So I do vaguely

> remember sharing that those things could happen if we ever have a seniority becomes an issue when it comes to approving vacations ***if we ever have a contract.***

Id. (Emphasis added). Finally, Ms. Ninan explained that a direct management-employee relationship "may not be possible ***if there is a contract***" because the employees would be represented by the Union, and this might not make it possible for Ms. Ninan to work with Ms. Ngezem on things like income verification letters. Tr. 409:13-17. (Emphasis added). In response, Ms. Ngezem thanked Ms. Ninan for sharing the information with her. Tr. 411:16-19.

The ALJ failed to provide any basis for his credibility determination regarding why he credited Ms. Ngezem's testimony instead of Ms. Ninan's testimony with respect to whether Ms. Ninan said terms and conditions of employment *may* change with a union contract or that they *would* change.

G. October 19, 2016 - Officer Hawkins' Brief Interaction With A Group of Nurses

The ALJ concluded that Office Hawkins coercively interfered with nurses' union activities and interrogated nurses. JD 15:20-22. On October 19, 2016, Officer Hawkins was patrolling in or around the Hospital cafeteria when he approached three nurses – Ms. Scott, Ms. Mintz and Jessie Norris – conversing in the corridor outside of the cafeteria. Tr. 288:16-18; 289:8-13. Officer Hawkins asked the nurses a basic question, "Are you having a union meeting?" Tr. 500:9-12. Ms. Scott responded that Officer Hawkins cannot ask them that and that they were discussing the Union and could do so because they were in a non-work area. Tr. 289:22-23; 500:14-16. Officer Hawkins then stated, "thank you, have a nice day" and left. Tr. 500:18-19. The brief exchange lasted a matter of seconds. Officer Hawkins never instructed Ms. Scott, Ms. Mintz and Ms. Norris to leave and, in fact, they remained in the corridor outside the cafeteria and continued with their conversation. Tr. 500:17-18. There is no record evidence of Officer Hawkins threatening to charge anyone with trespass.

IV. ARGUMENT

A. The Non-Solicitation Policy and Interpretive October 7 Memorandum Are Lawful.

1. The ALJ's Conclusion That The Definition of "Solicitation" Is Vague and Creates Confusion Among Nurses Must Be Overturned Because It Ignores The Uncontradicted Evidence In the Record That Nurses Knew and Understood That They Could Discuss the Union and Solicit For or Against It As Long As They Were Not Engaging in Direct Patient Care.

The ALJ found that the Policy and Memo's definition of "solicitation" obscured the line between "solicitation" and "discussion" of union activity, and would lead an employee to reasonably believe that lawful discussion about the Union was forbidden during working time. JD 15:2-4. The ALJ failed to address the Hospital's argument that the Policy is lawful as communicated through the Memo and in email from management and applied. The ALJ ignored the uncontradicted evidence that the Hospital permitted discussion about the Union, and that no confusion about the Policy existed among the nurses as they engaged in such discussions throughout the campaign.[9] *See supra* at 7-9.

Even if a policy is found to be unlawful on its face because it is ambiguous or overbroad, an employer may rebut the presumption that its rule interfered with or restrained protected activity by showing that it clarified the rule "either through oral communication, or in such a manner as to convey an intent to permit" the protected activity. *The Broadway*, 267 NLRB 385, 403 (1983). For example, the Board has held that an employer could clarify a facially unlawful rule by showing that it *applied* the rule in such a way as to convey an intent clearly to permit the

[9] The Hospital excepts to the ALJ's finding that the Memo's statement "nurses opposed or in support of the union may leave literature for pick up as long as it is a non-work or patient care areas *where Holy Cross allows solicitations and/or distributing personal materials*" is overbroad. JD 16:15-29. The Hospital has clearly communicated the policy. Nurses testified that that they have left literature for pick up in nurse lounges and other non-patient care areas and that management has also left literature in those areas. Tr. 103:2-17; 149:20-22; 307:4-308:25.

protected activity in a lawful way. *Our Way, Inc.*, 268 NLRB 394, 411-412 (1983); *see also Essex Int'l, Inc.*, 211 NLRB 749, 750 (1974) (finding that an employer could "show by extrinsic evidence" that the rule was "applied in such a way as to convey an intent clearly to permit" lawful solicitation).

In *Cox Communications*, NLRB Div. of Advice 17-CA-087612 (Oct. 19, 2012), the Division of Advice found that, in some circumstances, a disclaimer may be further evidence of a policy's lawfulness:

> Finally, the social media policy's savings clause, which provides that "[n]othing in Cox's social media policy is designed to interfere with, restrain, or prevent employee communications regarding wages, hours, or other terms and conditions of employment," further ensures that employees would not reasonably interpret any potentially ambiguous provision in a way that would restrict Section 7 activity.

The Hospital's Policy contains such a clause: "this policy is not intended to interfere with or impede the exercise of rights under applicable law." GC Ex. 2. Likewise the Memo provides "Nothing in this message is intended to restrict any nurses' right to discuss terms and conditions of employment, and/or to solicit for or against a union." GC Ex. 3.

There is substantial and uncontradicted evidence that the nurses understood that discussion of the Union is permitted in all areas and at all times as long as it does not interfere with patient care, and they have engaged in such discussions in all areas of the Hospital.[10] Tr. 103:18-104:9; 182:3-6; 193:13-194:4; 296:24-35; 297:1-299:21; 305:20-23; 316:14-317:6; 342:6-19; 343:22-344:13; *See St. Mary's Hospital of Blue Springs*, 346 NLRB 776 (2006) (holding that a hospital may limit discussion about the Union when it interferes with patient

[10] The Hospital excepts to the ALJ's conclusion that its failure to define "unauthorized persons" created a chilling effect on employees because there is uncontradicted evidence that the Hospital allowed off-duty nurses to come to the Hospital to engage in union activities. Tr. 94:6-95:7; Tr. 256:7-12. The Hospital further excepts to the ALJ's finding that the policy sent a message to employees that they needed to seek pre-authorization from the Hospital prior to soliciting non-employees because there is no evidence that supports this. JD 16:1-6.

care). This common understanding is based upon the legitimate business purpose of the Policy and Memo – to prevent disruption to patient care – and how the Hospital has applied the Policy and Memo. GC Ex. 2-3. The Supreme Court requires the trier of fact to consider the business justifications for workplace rules when deciding whether the rules violate the Act. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). The Policy contains an explicit declaration of its purpose:

> The health system established this policy to protect the privacy of patients, visitors, colleagues and prevent interference with the delivery of patient care …

GC Ex. 2. Likewise the Memo provides that the purpose is to "protect the privacy of our patients and prevent interference with the delivery of patient care." GC Ex. 3.

The proof of the nurses' understanding was introduced in the testimony of EVERY witness called by the General Counsel. Each witness testified that the Hospital had permitted her to engage in conversations about and solicitation on behalf of the union in corridors, stairways, nurses' stations, on units, in elevators and while off duty. *See supra* at 7-9. Extrinsic evidence, such as past practice, and the General Counsel's own witnesses' testimony prove that no confusion exists. For example, when patients are present, when physicians and nurses discuss plans of care, when nurses retrieve medication for patients, when nurses are charting, among other things, nurses know that their full attention must be on the patient. Tr. 196:17-197:8. However, when there is down time, the reality is that nurses talk about non-work related things, such as the Union. Tr. 86:5-8; 86:22-87:12; 96:6-10; 182:3-6; 193:13-194:4; 294:4-15; 296:24-35; 297:1-22; 298:9-19; 299:8-21; 305:20-23; 342:6-19.

The Board should not apply the rule in *Con-Agra Foods, Inc.*, 361 NLRB No. 113, slip op. at 3 (2014), enf. in part and set aside in part 813 F.3d 1079 (8th Cir. 2016), to this case, because the record is replete with evidence that the nurses knew and understood that they could

discuss the Union at any time and in any area except when they engaged in direct patient care. Tr. 100:3-6, 192:11-14; 299:18-21; 344:14-345:9. *Con-Agra* is not an appropriate basis for a finding of violation in this case because there is evidence of widespread permitted discussion and no evidence that the definition of "solicitation" in the Policy or the Memo chilled discussion or solicitation. The Board should consider the circumstantial differences between *Con-Agra* where the activity took place on the shop floor and, here, where the activity is taking place in a hospital where patients are present.

Moreover, in this case, where there has been no restriction or hindrance of discussion about the Union, the Board should abandon the test used *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which renders unlawful almost all employment policies and work rules, and should return to the balancing test it previously applied to these types of claims. *Id.; see William Beaumont Hosp*., 363 NLRB No. 162 (2016) (Miscimarra, dissenting) ("I believe the time has come for the Board to abandon *Lutheran Heritage* … Under *Lutheran Heritage*, reasonable work requirements have become like Lord Voldemort in *Harry Potter*: they are ever-present but must not be identified by name … in the world created by *Lutheran Heritage*, it is unlawful to state what virtually every employee desires and what virtually everyone understands the employer reasonably expects.").

Member Miscimarra points out the multiple defects inherent in the *Lutheran Heritage* test:

- The "reasonably construe" standard entails a single-minded consideration of NLRA-protected rights, without taking into account the legitimate justifications of particular policies, rules and handbook provisions. This is contrary to Supreme Court precedent and to the Board's own cases.

- The *Lutheran Heritage* standard stems from several false premises that are contrary to our statute, the most important of which is a misguided belief that unless employers correctly anticipate and carve out every possible overlap with

NLRA coverage, employees are best served by not having employment policies, rules and handbooks. One can hardly suggest that it benefits employees to deny them general guidance regarding what is required of them and what standards of conduct they can expect or demand from coworkers. In this respect, *Lutheran Heritage* requires perfection that literally has become the enemy of the good.

- In many cases, *Lutheran Heritage* invalidates facially neutral work rules solely because they are ambiguous in some respect. This requirement of linguistic precision stands in sharp contrast to the treatment of "just cause" provisions, benefit plans, and other types of employment documents, and *Lutheran Heritage* fails to recognize that many ambiguities are inherent in the NLRA itself.

- The *Lutheran Heritage* "reasonably construe" test improperly limits the Board's own discretion. It renders unlawful every policy, rule and handbook provision an employee might "reasonably construe" to prohibit any type of Section 7 activity. It does not permit the Board to recognize that some types of Section 7 activity may lie at the periphery of our statute or rarely if ever occur. Nor does *Lutheran Heritage* permit the Board to afford greater protection to Section 7 activities that are deemed central to the Act.

- *Lutheran Heritage* does not permit the Board to differentiate between and among different industries and work settings, nor does it permit the Board to take into consideration specific events that may warrant a conclusion that particular justifications outweigh a potential future impact on some type of NLRA-protected activity.

- Finally, the Board's *Lutheran Heritage* "reasonably construe" test has defied all reasonable efforts to make it yield predictable results. It has been exceptionally difficult to apply, which has created enormous challenges for the Board and courts and immense uncertainty and litigation for employees, unions and employers.

Id. Member Miscimarra's view that the Board should return to a balancing test is a better reflection on the policy of the Act. The balancing test allows the Board to take into consideration the employer's justifications for particular policies and provides the Board with discretion in considering the differences between industries and work sites. It also provides predictability to employers, employees, and unions when it comes to rules and workplace expectations.

The Board should consider replacing *Lutheran Heritage* with a balancing test condoned by the Supreme Court when determining whether particular work requirements unlawfully interfere with NLRA-protected rights:

> The Board has the "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy."

Id. citing NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33-3 (1967) (emphasis added). *See also Republic Aviation v. NLRB*, 324 U.S. 793, 797-798 (1945).

Under this balancing test, the Policy and Memo have not unlawfully interfered with nurses' Section 7 rights. The Hospital's asserted business justification for having the Policy – preventing any interference with patient care – is strong and legitimate. The Board must have the discretion to differentiate between industries and work settings. The ability to maintain a peaceful and tranquil atmosphere (and limit disruptive discussion) is much more important in a hospital where it is essential for patient rehabilitation than on the shop floor. *See infra* at 30-31.

For these reasons, the Board should overturn the ALJ's conclusions concerning the Policy and the Memo.

2. <u>The ALJ's Conclusion That The Policy Prohibited Nurses From Using The Hospital's Email System Ignored Uncontradicted Evidence That The Hospital Communicated That It Is Permissible To Use Email for Discussions About The Union and That Nurses Openly and Frequently Used Email to Discuss The Union.</u>

The ALJ erred in finding that the Hospital failed to meet its burden of showing that it communicated or applied the rule on email solicitation in such a way as to convey an intent clearly to permit the protected activity.[11] JD 17:6-30. The uncontradicted evidence establishes that the Hospital clearly conveyed its intent to permit solicitation and discussion of the Union

[11] The ALJ's conclusion was isolated to the Policy. The Memo did not prohibit the use of email for non-work related discussion, including discussions about the Union.

over its email system, and more than "some" employees ignored the rule and were not disciplined. *See Ichikoh Manufacturing, Inc.*, 312 NLRB 1022 (1993).[12]

Most importantly, the ALJ gave no weight to the uncontroverted evidence that the Chief Nursing Officer Celia Guarino emailed **all nurses** clarifying the rule and inviting nurses to use the email system to communicate about the Union:

> Holy Cross has done what most employers don't do, and made it's email system and distribution list available to all nurses so they can exchange ideas and thoughts, whether they or [sic] for or against the union or not.

R. Ex. 1 (HCH000561). Ms. Guarino's email shows that the Hospital clearly communicated its intent to permit discussion about the Union over its email system. Record evidence and Respondent's Exhibit 1 reinforce the fact that nurses understood that it was permissible to discuss the Union over email. R. Ex. 1; Tr. 103:18-104:9. Nurses used the list serve to discuss the Union so frequently that many nurses requested to be removed from the list to avoid receiving the emails. *Id.* (HCH000552). The Hospital did not remove any nurses from the list serve. *Id.* (HCH000561).

The ALJ's finding that the Hospital failed to meet its burden of showing that more than "some" employees ignored the rule is wrong. Respondent's Exhibit 1, a sample of the countless emails sent advocating for and against the Union, shows that at least 13 nurses utilized the list serve to all nurses for this purpose. R. Ex. 1. Contrary to the ALJ's finding, this is not evidence of a select few nurses using the email system. The Hospital offered Respondent's Exhibit 1 (and it was admitted) as a "*group* of emails sent by nurses using the Hospital's email system, some of which are pro-union, some of which are against the Union" and "to prove that the Respondent's

[12] There are no cases where the Board has concluded that a sampling of emails that demonstrates the use of a list serve by nurses to email 1,300 nurses is insufficient showing of widespread use and disregard for the policy.

email system was *regularly* used by nurses to discuss the Union and for union solicitation." Tr. 220:11-17. (Emphasis supplied). The list serve contains the names of over 1,300 nurses.

For these reasons, the Board should overturn the ALJ's conclusion concerning the Policy's reference to email.

3. The ALJ's Conclusion That Corridors, Stairways and Elevators Used By or To Transport Patients Are Not Immediate Patient Care Areas Ignores Uncontradicted Evidence That Patients Are Frequently Present In These Areas For Treatment-Related Purposes.

The ALJ erred in finding that Hospital corridors, elevators and stairways used by or to transport patients are not patient care areas. The ALJ ignored the record evidence that patients regularly use these areas in the course of receiving treatment.

> With few exceptions, people go to the hospital because they need to, not because they want to. Whatever an individual patient's condition might be, it is often serious, sometimes critical--even a matter of life or death. Hospitals and those who work there bear a heavy obligation to make patient care their paramount concern.

William Beaumont Hosp., 363 NLRB No. 162 (2016) (Miscimarra, dissenting). The Supreme Court has recognized "that a tranquil atmosphere is essential to carrying out [the hospital's primary function that is patient care]." *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979). Health care facilities may prohibit solicitation in "immediate patient care areas" where patients receive treatment. *Id.*

When patients are present in corridors, elevators and stairways, a tranquil atmosphere is essential to carrying out patient care. Hospital corridors are patient care areas when patients undergoing treatment are present in the corridors. When patients are temporarily placed in the corridors to be closely monitored by medical staff, these patients are still undergoing treatment. *See* Tr. 180:9-16. Patients are also frequently present in the corridors for treatment-related purposes, including for transport to other units or on units where patients ambulate through the

units. Tr. 104:25-105:10; 180:17-22; 181:9-15. Elevators and stairways used by or to transport patients are similarly patient care areas when patients are present in those areas while they are undergoing treatment. Tr. 105:11-20.

The ALJ ignored the Memo clarification that immediate patient care areas include:

> …
> - Corridors/hallways on the units – *if a patient is present in hallway (for example patients walk in the hallways for rehabilitation and exercise or being transported, etc.) then it is a patient area.*
> - Elevators and stairways being used by or to transport patients

GC Ex. 3. (Emphasis added). The Hospital clarified that these areas are patient care areas when patients are present because solicitation and non-work relate discussions would be disruptive to patient care.

Accordingly, the record evidence supports that when patients are present in corridors, elevators and stairways, the Hospital should be able to define these areas as "patient care areas" and restrict solicitation. For these reasons, the Board should overturn the ALJ's finding with respect to corridors, elevators and stairways used by patients.

B. The ALJ Erroneously Concluded That Ms. Hawley Unlawfully Interrogated And Threatened Ms. Reed-McCullough With Loss of Benefits And More Onerous Working Conditions.

1. The Evidence in the Record Does Not Support Any Finding That Ms. Hawley Threatened Ms. Reed-McCullough With Loss of Benefits or More Onerous Working Conditions.

The Board should overturn the ALJ's conclusion that by omitting reference to the collective-bargaining process, Ms. Hawley threatened Ms. Reed-McCullough with more onerous working conditions and loss of benefits. An explicit reference to the collective bargaining process is not a condition precedent to finding a statement is lawful. *See Tri-Cast, Inc.*, 274 NLRB 377, 378 (1985) (employer's statement that "under union restrictions, it would lose the

flexibility it needed to beat the competition and could not stay healthy" was lawful without reference to the collective bargaining process).

The ALJ cites to *Metro One Loss Prevention Servs. Group*, 356 NLRB 89 (2010), *Alleghany Ludlum Corp*., 320 NLRB 484 (1995) and *Novelis Corp*., 364 NLRB No. 101 (2016) as support for his conclusion that Ms. Hawley must reference the collective-bargaining process in order for her statements to be lawful. The facts of each of these cases are distinguishable from the present facts at hand, and the ALJ incorrectly describes the holdings in these cases.

The ALJ erred in stating that *Metro One Loss Prevention Servs. Group* stood for the proposition that "the statement that the presence of a union 'could' deteriorate employment conditions is unlawful absent a reference to the collective-bargaining process." JD 19:11-14. In *Metro One Loss Prevention Servs. Group*, the Board held that the Senior Account Manager unlawfully threatened a sales floor employee where (1) it was unusual for the manager to come on the sales floor and talk to employees, (2) this exchange happened shortly after the employee's support for the union became known, and (3) the manager stated:

> [You] need to be grateful for the number of years that [you] have been working with Metro and for [your] pay rate. It could be worse; it could get much worse in the event the Union comes in.

356 NLRB 89 (2010). The Board found that "those statements, taken together, reasonably conveyed to the employee that he would be jeopardizing his job security and current wage rate by supporting the Union." *Id. citing Liberty House Nursing Homes*, 245 NLRB 1194, 1198-1199 (1979) (employer unlawfully threatened employees with more onerous working conditions by, among other things, stating that "if the Union came in, times would be even worse"). The Board

did not hold that absent a reference the collective-bargaining process the statement was unlawful.[13] Instead, the Board considered three factors:

> (1) it was unusual for the supervisor in question to approach the employee,
> (2) the employee's union affiliation was known, and
> (3) the statement reasonably conveyed to the employee that he or she would be jeopardizing his job benefits or working conditions.

356 NLRB 89 (2010). Under this analysis, Ms. Hawley's statements do not constitute unlawful threats. First, it was not unusual for Ms. Hawley to interact with Ms. Reed-McCullough. Ms. Hawley supervised Ms. Reed-McCullough since 2011.[14] Tr. 117:13-20. Ms. Hawley frequently interacted with Ms. Reed-McCullough in shift huddles, in approving Ms. Reed-McCullough's FMLA requests and her NICU scheduling shift contract among other instances. Tr. 116:13-15; 122:15-18; 123:7-9. Second, and most importantly, Ms. Hawley had no knowledge that Ms. Reed-McCullough was an "open union supporter" on July 21, 2016. There is nothing in the record that supports this erroneous assumption. In fact, the ALJ did not find that Ms. Hawley knew that anything about Ms. Reed-McCollough's union support but later relied on this incorrect "fact" it in his legal analysis. *See* JD 8:5-38; 19:18. It is obvious that the ALJ confused Ms. Reed-McCullough with Ms. Scott who testified that she told Ms. Hawley that she supported the Union in July 2016. Tr. 256:13-21. Finally, unlike in *Metro One* and *Liberty House Nursing Homes* where the supervisor stated that terms and conditions of employment *would* get worse if a union was elected representative, here, Ms. Hawley never stated that it would get worse if the Union is elected. 356 NLRB 89 (2010); 245 NLRB 1194 (1979). The statements in the Board

[13] In *Metro One*, the Board explained that the cases cited by the respondent did not apply because, in those cases, the Board declined to find violations where employers stated that the collective bargaining would not necessarily result in better working conditions. 356 NLRB 89 (2010). This does not mean that the Board will always find the inverse – without a reference to the collective-bargaining process, the statements will always be unlawful.

[14] Ms. Reed-McCullough testified that Ms. Hawley supervised her since 2011 when she was a student extern and tech, and then in 2012 to present as a nurse.

cases relied upon by the ALJ are much more egregious than any of Ms. Hawley's statements, and the comparison to them highlights the legality of Ms. Hawley's comments. Ms. Hawley specifically stated that working conditions *could* get better, worse, or stay the same:

- "…there wasn't a huge difference being in a unionized hospital versus a non-unionized hospital as far as like staffing and nurse satisfaction goes"
- "…there could be some changes that people might like with the Union, and there could be some changes that people might not like"

Tr. 120:19-121:22. These statements are not threatening because she stated that both good and bad changes could take place, not that the Union would solely result in negative changes. The statements of Ms. Hawley are taken from testimony of Ms. Reed-McCollough. There is no need for a credibility determination. Likewise, there are no cases which hold that these statements are unlawful.

Similarly, the Board never held in *Alleghany Ludlum Corp.,* that by omitting any reference to the collective-bargaining process, an employer's statements will automatically be considered unlawful. 320 NLRB 484 (1995). *Alleghany Ludlum Corp.* is distinguishable because the supervisor stated that "employees *would* lose flexibility in their working conditions if they selected the [u]nion as their representative." *Id.* These comments were made to clerical employees against the background of a bitter strike by the production unit employees, who had been represented for many years by the same union seeking to represent the clerical workers (and the clerical workers had worked in the plant as temporary replacements for the strikers). *Id.* The facts of July 20 are distinguishable because Ms. Reed-McCullough testified that Ms. Hawley stated there *could* be some changes – not that there *would* be definite changes – and that they would not all be necessarily negative. Tr. 120:19-121:22. The context is also different. There is no evidence that Ms. Reed-McCullough was an open union supporter and Ms. Hawley never compared the nurses' situation to any represented colleagues who experienced decreased benefits

after selecting the same Union as their representative. Tr. 120:19-121:22. In fact, Ms. Reed-McCullough testified that she never felt as though Ms. Hawley would retaliate against her if she supported the Union. Tr. 129:16-20.

Finally, the ALJ's reliance on *Novelis Corp.,* 364 NLRB No. 101 (2016) is error. In *Novelis Corp.,* the Board held that two supervisors' statements that employees *would* lose their flexible work schedules constituted threats of more onerous working conditions. 364 NLRB No. 101 (2016). According to the only witness called by the General Counsel on this claim, Ms. Hawley never stated that employees *would lose* benefits.

Therefore, the ALJ's finding of a violation must be overturned as to Ms. Hawley.

2. There Is No Evidence Supporting a Finding that Ms. Hawley Interrogated Ms. Reed-McCullough.

The Board should overturn the ALJ's conclusion that Ms. Hawley interrogated Ms. Reed-McCullough by stating that "'some nurses had been called at home and harassed' by union representatives, and encouraged Reed-McCullough to let Hawley know if anything like this were to happen to her." JD 21:44-46.

The ALJ relies on *Tawas Industries, Inc.,* 336 NLRB 318 (2001) in which the Board has held that it is unlawful for "employers to state that *employees* who harass or pressure other employees in the course of union solicitations should be reported to management, who will discipline the offending individuals." However, Ms. Hawley encouraged Ms. Reed-McCullough to notify her if *union representatives,* not employees, were harassing her. *See* JD 21:44-46. This is not unlawful interrogation under *Tawas Industries* because it does not have the potential effect of encouraging employees to identify other employees who support the union. *Id.* This statement also does not indicate that the Hospital intends to take any action against any employees, but instead to stop harassment from non-employee union representatives. *Id.*

Therefore, this finding of a violation also must be overturned.

C. The ALJ Erroneously Concluded that Security Officers Coercively Interfered With Nurses' Union Activities on August 6, 2016.

The Board should overturn the ALJ's conclusion that by writing down the names of two nurses who earlier visited an on duty nurse, by stating that they were going to "take this matter to the nursing coordinator," and filing an incident report naming the nurses, the security officers interfered with the nurses' union activities. JD 20:37-42.

The case cited by the ALJ, *Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach and Hotel Renew,* 365 NLRB No. 53 (2017), does not support a finding that the security officers coercively interfered. The facts in *Aqua-Aston* are so far removed from facts of the August 6 incident that they actually support the Hospital's position that there was no violation of the Act.

In *Aqua-Aston*, an off duty employee, who was distributing literature in the hotel lobby, was approached by the head of security, a security officer, and the employee's supervisor, the Front Officer Manager. 365 NLRB No. 53 (2017). The head of security verbally warned the employee to stop handbilling in the lobby and instructed him that he was prohibited from handbilling on the property. *Id.* The head of security then told the employee that if he refused to leave, he would be "trespassed" which meant that the hotel would bar the employee from the hotel property for one year with the threat that, should the employee return within that year, the employee would risk arrest. *Id.* The head of security instructed the employee to leave the property. *Id.* When the employee did not leave, the head of security again threatened to "trespass" him unless he stopped handbilling. *Id.* The employee left the property. *Id.*

The cases in which the Board has held that security officers' actions at issue constitute coercive interference are based on facts which are patently distinguishable from the facts in this case. *See e.g., North Mem'l Health Care,* 364 NLRB No. 61 (2016) (coercive interference where

security officers forced off duty employees to remove union shirts and to leave the facility); *DHL Express, Inc.*, 355 NLRB 680, 686 (2010) (employer unlawfully interfered with protected concerted activity when its security guards told handbillers that they could not handbill on the sidewalk leading to the plant entrance, threatened to call, and actually called, the police); *Poly-America, Inc*., 328 NLRB 667 (1999) (violation where security guards ordered off-duty employees, who were handbilling in the parking lot, to leave the employer's premises and confiscated union materials).

The security officers' actions on August 6 are not even similar to actions which the Board has determined violate the Act. First, the security officers were called to 5 South because the off duty nurses Ms. Mintz and Ms. Scott were interfering with patient care by entering the patient care unit and attempting to call on duty nurses off the unit.[15] Tr. 450:9-25; 453:10-20; 456:1-3. Two low level security officers – as opposed to the nurses' supervisor or other official manager – responded to the call on 5 South. Officer Webster immediately cleared Varnado after assessing that there was no security threat.[16] R. Ex. 32; Tr. 477:3-6; 497:11-19; 504:19-24. Only Officer Webster spoke to the nurses. R. Ex. 32. Unlike in *Aqua Aston*, Officer Webster never instructed the nurses that they were prohibited from soliciting or discussing the Union in the waiting area, or that they must leave. Officer Webster never threatened the nurses with trespass or arrest. The word "union" never came up in the conversation between Webster and the nurses. It is significant that the nurses were permitted to remain in the waiting area on 5 South after Officer

[15] The Hospital excepts to ALJ's conclusion that the Hospital, by NIC Dwight Lyles, violated the Act by calling security officers to respond to nurses' union activities. JD 24:45-46. It was lawful for Mr. Lyles to call security when Ms. Scott and Ms. Mintz were interfering with patient care by calling an on-duty nurse off the unit, and for wrongfully entering a locked unit. Tr. 62:17-63:8; 98:10-23; 264:13-17; 453:10-20; 456:1-3. R. Ex. 32. Mr. Lyles could not see Ms. Mintz's badge and did not know she was a nurse. Tr. 452:3-6.

[16] At this time, Officer Lawrence Hawkins, who was patrolling the area and not responding to the call, coincidentally exited the elevator. *Id.*; Tr. 479:15-16; 497:1-2; 501:12-13. Officer Hawkins then continued on his patrol. R. Ex. 32.

Webster left. R. Ex. 32; Tr. 67:19-20; 479:7-11. The nurses did in fact stay in the waiting area for another ten minutes without any interference or interruption. Tr. 67:21-68:2; 69:9-10; 269:6-8. The nurses voluntarily left the waiting area on and went down to the café in the lobby area where they continued their union activity and met with another nurse. Tr. 69:14-23; 270:9-10. After August 6, no one from Hospital management counseled, disciplined, or even spoke to the nurses about the incident. Tr. 99:25-100:11.

The fact that Officer Webster wrote down the names of every nurse, including the Nurse in Charge, and filed an incident report naming all the nurses fails rise to the level of coercive interference. The Board has held that where a security officer merely records the identity of an employee engaged in union activity alone is insufficient to constitute unlawful interference. *Great Lakes Steel Division*, 238 NLRB 253 (1978) (The Board affirmed the ALJ's holding that, even assuming that the security guard, out of an abundance of caution, took down license numbers of employees temporarily in the parking area for distribution of literature, that act alone, without more, was insufficient to establish interference.) Officer Webster testified that he routinely writes down the names of individuals who he interacts with when responding to a call. R. Ex. 28; Tr. 67:8-14; 485:12-20; 478:4-11. Officer Webster also testified that he routinely files incident reports after investigating incidents. GC Ex. 18; Tr. 480:20-25; 481:17-24. He was not recording their names or specifically making a report because it was union-related, and there is no evidence in the record that the Hospital officials reviewed or used the report, or that it directed Webster to write the report.

Officer Webster's statement that he was going to "take this matter to the nursing coordinator" did not hinder or restrain Ms. Mintz or Ms. Scott in their union activity. They continued to meet with a nurse in the lobby café, and then admitted to continuously coming to

the Hospital while off duty to solicit after the August 6 incident. Tr. 69:14-23; 92:11-93:6; 94:6-95:7; 256:7-12; 270:9-10.

Finally, the ALJ's finding that the "nurses noticed that two of the security officers from the earlier fifth floor incident suddenly reappeared and were standing nearby, looking at them" must be rejected. JD 11:1-2. Officer Webster credibly denied going to lobby or seeing the nurses at all after the incident on 5 South. Tr. 481:2-10. There is no record evidence that Officer Hawkins went down to the lobby either as he credibly testified that he continued to patrol 5 South and the neighboring units.[17] Tr. 498-505.

The ALJ's decision ignores the reality of everyday operations of busy hospitals in metropolitan areas, where there are intruder and other security concerns, particularly when individuals access a patient care unit. In this situation, the Hospital's response deliberately avoided any action to interfere with or discover union activities. In fact, the security officers took steps to keep from interfering, once they understood that the nurses were employees.

The ALJ also wrongly concluded that Officer Hawkins coercively interfered when he walked by nurses in the corridor during his patrol and commented, "I want to see what they're offering." It is the General Counsel's burden to prove unlawful interference. The General Counsel failed to call a single nurse witness to testify to what happened. No nurses testified that Officer Hawkins caused them to disperse. Only Officer Hawkins testified to the exchange and he testified that he spoke to the nurses in a joking manner. Officer Hawkins never stated for the nurses to cease activity and he never threatened to ban them from the Hospital. The General Counsel relies on Officer Webster's incident report, but it should be given no weight because he was not present for the exchange. *See* GC Ex. 18.

[17] Even if the nurses saw Officer Varnado, which there is no record evidence of that happening, the nurses' testimony is flawed because that would only be one of the security officers from the fifth floor incident.

Therefore, the Board should overturn the ALJ's conclusions regarding the actions of security officers on August 6.

D. The ALJ Erroneously Concluded that Ms. Joseph and other Nurses in Charge Surveilled Nurses' Union Activity and Created the Impression of Surveillance.

The Board should overturn the ALJ's conclusion that Ms. Joseph and other Nurses in Charge engaged in unlawful surveillance. JD 23:24-26.

The Board has repeatedly held that an employer may lawfully surveil employees engaged in protected activities in the open, and on or near the employer's premises. *Roadway Package System*, 302 NLRB 961 (1991); *Southwire Co.*, 277 NLRB 377 (1985). In *Basic Metal and Salvage Co., Inc.*, 322 NLRB 462 (1996), the Board held that a supervisor's conspicuous observation of employees openly meeting with a union organizer approximately 100 feet away from the employer's property under an expressway was not unlawful because the employees did not attempt to conceal their activities.

The Board has generally found a lower threshold for holding an employer in violation of Section 8(a)(1) when there are photographs. *Alle-Kiski Medical Center*, 339 NLRB 361, 364 (2003). Although employers have the right to maintain security measures necessary to the furtherance of legitimate business interests during union activity, photographing of the activity can only be justified if the surveillance serves a legitimate security objective, *National Steel and Shipbuilding Company*, 324 NLRB 499 (1997), or if the employer can demonstrate that it had a reasonable basis to believe misconduct would occur. *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691 (7th Cir. 1976). However, such a rigid rule that prohibits all photography except those undertaken for security purposes is not consistent with the policy of the Act.

The Third Circuit Court of Appeals denied enforcement of the Board's decision in *National Steel and Shipbuilding Company* and held that an employer's photography of

employees engaged in a peaceful demonstration does not constitute *per se* unlawful surveillance and that a case by case determination was necessary when examining an alleged Section 8(a)(1) violation. *U.S. Steel Corp. v. NLRB*, 682 F.2d 98, 101 (3d Cir. 1982). The case by case analysis provides that:

> To establish a violation of Section 8(a) (1), it need only be shown that "*under the circumstances existing*, [the employer's conduct] may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."

Id. citing NLRB v. Armcor Industries, Inc., 535 F.2d 239 (3d Cir. 1976), *quoting Local 542, International Union of Operating Engineers v. NLRB*, 328 F.2d 850, 852-53 (3d Cir.), *cert. denied*, 379 U.S. 826 (1964) (emphasis added).

The ALJ's ruling on this claim is a blind application of the rule barring employer photographs of union activity. It is obvious that the ALJ failed to consider the "existing" facts and circumstances of this case. The ALJ's conclusion is inherently illogical that the nurses who published photos of themselves engaging in union activity to management (so that management has copies of the photos) were coerced by the mere fact that manager took the same photos. In other words, the fact that Ms. Joseph took the *same* photograph of the same activity at the same time as the photograph which the union published moments later cannot be the factual predicate for a conclusion that management's photograph coerced union activity.

The ALJ heavily relies on *Fairfax Hospital*, 310 NLRB 299 (1993), in which it held:

> … the fact that pictures were also taken by the media and even by a friend of one of the participants who invited him to take the pictures, makes no difference. The essence of the unfair labor practice charge is that employers have no right to spy on the union and concerted activities of its employees. Such spying is coercive … even if the union adherents had made their identities public.

Id. It *does* make a difference that the very nurses themselves – not the media or friends – took these pictures and distributed them throughout the Hospital to nurses and management alike. GC

Ex. 8; 13-15; Tr. 419:12-420:7. The nurses' actions prove that the nurses were not intimidated or chilled in their actions by management taking and seeing the photographs because it took the same photo and published the same photo and distributed it all over the Hospital moments later. In fact, the evident purpose of the Union in posing for the photograph and then publishing it was to convey their identities and actions to everyone in the Hospital.

There is ample record evidence that further supports that Ms. Joseph's photos had absolutely no effect on the Union supporters or intimidated any nurse. The nurses in the parking lot observed the NICs taking photos and, in response, raised their arms and cheered and smiled at those in the conference room. GC Ex. 13-15; R. Ex. 15; Tr. 158:10-13. After Ms. Ngezem personally observed camera flashes coming from inside the conference room, she rejoined the group of nurses. Tr. 189:20-191:16. Ms. Ngezem was also smiling and laughing like many of the other nurses, making no effort to shield her identity. *Id.*; Tr. 210:6-18; GC Ex. 13-15. After posing for their picture, the nurses marched inside the Hospital as a group holding their banner, walked down a main corridor on the First Floor, through the front lobby, up the elevator and into Administration on the Fourth Floor and attempted to present their banner to Dr. Coots. Tr. 158:20-159:15; 191:18-192:3.

The ALJ failed to examine the factual setting of this case in reaching its conclusion that the Hospital's surveillance was unlawful. Although the Board is not bound by the Third Circuit Court of Appeals' decision in *U.S. Steel Corp.*, the Board must adopt a case by case analysis and consider the circumstance of each case to prevent reaching illogical results. Here, the Hospital's photographing of the nurses' activity caused no actual interference, restraint, or coercion of employees' exercise of their Section 7 rights under the Act.

The record evidence also supports that Ms. Joseph did not create an impression of surveillance under current Board law because Ms. Joseph did not do anything out of the ordinary. *Durham Sch. Servs., L.P.*, 361 NLRB No. 44 (2014) (it is not a violation of the Act for an employer to merely observe open union activity, so long as its representatives do not engage in behavior that is "out of the ordinary") citing *Partylite Worldwide, Inc.*, 344 NLRB 1342 (2005); *Arrow Automotive Industries*, 258 NLRB 860 (1981), enfd. 679 F.2d. 875 (4th Cir. 1982). Ms. Joseph credibly testified that she initially took the picture because she thought it was a celebration and awards ceremony, and that she regularly takes cell phone photos of nurses at celebrations at work. Tr. 368:17-18; 371:23-24; 372:13-15; 389:14-20. There is nothing to suggest that Ms. Joseph's testimony that her initial thought that the nurses' were being photographed as part of a celebration was false.

Accordingly, the Board should apply the facts and circumstances of this case to a case by case analysis and overturn the ALJ's conclusion.

E. The ALJ Erroneously Concluded That Ms. Ninan Unlawfully Threatened Ms. Ngezem With Loss of Benefits And More Onerous Working Conditions.

The Board should overturn the ALJ's conclusion that by omitting reference to the collective-bargaining process, Ms. Ninan threatened Ms. Ngezem with more onerous working conditions and loss of benefits. An explicit reference to the collective bargaining process is not a condition precedent to finding that the statement is lawful. *See supra* at 31-35. Even so, Ms. Ninan mentioned the collective bargaining process multiple times in her conversation with Ms. Ngezem on September 21. For example, Ms. Ninan informed Ms. Ngezem that the flexibility in scheduling could change depending on what is negotiated in the contract – hence referencing the collective-bargaining process:

> ***If there was ever a contract*** by the Union, there may be possibility of changing that self-scheduling ***to what contract may be negotiated***. That could include every other weekend.

Tr. 406:17-21. (Emphasis added). Ms. Ninan also generally discussed that if a Union represents the nurses, vacation benefits may change depending on what is negotiated:

> Right now what we have is vacations are approved first-come, first-serve basis. So I remember vaguely talking about seniority when it comes to vacations approval ***if we [] have a contract***.

Tr. 406:25-407:4; 431:2-4. (Emphasis added). Ms. Ninan shared that her family friend, who was in a union, was denied vacation time due to her lack of seniority:

> A family friend … was trying to get a vacation, particularly for her child's christening in June, and [] unfortunately was not able to get it because of seniority. So I do vaguely remember sharing that those things could happen if we ever have a seniority becomes an issue when it comes to approving vacations ***if we [] have a contract.***

Id. Finally, Ms. Ninan explained that a direct management-employee relationship "may not be possible ***if there is a contract***" because the employees would be represented by the Union, and this might not make it possible for Ms. Ninan to work directly with Ms. Ngezem on things such as income verification letters. Tr. 409:13-17. (Emphasis added). The Board has found that a statement which explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before to be lawful. *Tri-Cast, Inc.*, 274 NLRB 377, 378 (1985); *In Re Dish Network Corp*., 358 NLRB 174, 174-75 (2012) (the Board affirmed the administrative law judge's decision that the employer did not violate Section 8(a)(1) of the Act when it told its employees that if the workplace became unionized, they would have to go to their union steward with any of their complaints, rather than their employer, and that the union controlled their fate, "not you.")

Ms. Ninan also communicated that benefits could change in the collective bargaining process in distributing Fact Sheet 10. Fact Sheet 10 entitled "What is Collective Bargaining?" provides:

> There are no guarantees: … [of] what will be in the final contract. You could wind up with more, the same, or less than you have now.
> …
> Collective bargaining is a one-size fits all approach. The agreement negotiated is on behalf of all nurses and may limit manager flexibility on such issues as holiday assignments, extending vacation requests and limiting overtime.

R. Ex. 24. Fact Sheet 10 was distributed in or around September 19, 2016 and Ms. Ninan met with Ms. Ngezem on September 21. *Id.* Therefore, Ms. Ngezem knew that working conditions were subject to change because of the collective-bargaining process.

The ALJ cites to *Metro One Loss Prevention Servs. Group*, 356 NLRB 89 (2010) for support for his conclusion. JD 20:6-11. *Metro One* supervisor's statements that left no doubt that union representation would bring worsening work conditions, *see supra* at 32, and that context in which they were are totally unlike Ms. Ninan's statements. Under the factors considered in *Metro One*, *see supra* at 32, Ms. Ninan's statements do not constitute an unlawful threat. First, it was not unusual for Ms. Ninan to interact with Ms. Ngezem. Ms. Ninan supervised Ms. Ngezem for about 1.5 years and they shared an amicable working relationship. JD 12:9-11; Tr. 147:12-25. During this time period, Ms. Ninan regularly met with Ms. Ngezem at the 7:00 a.m. huddles, during monthly staff meetings, and in one-on-one meetings. Tr. 434:1-13. Even though Ms. Ninan knew that Ms. Ngezem supported the Union, Ms. Ninan's statements never rose to a threatening level like the statements in *Metro One* or *Liberty House Nursing Homes* where the supervisors stated that terms and conditions of employment *would* get worse if a union was elected representative. 356 NLRB 89 (2010); 245 NLRB 1194 (1979).

Instead, Ms. Ninan merely stated that terms and conditions of employment *may* change depending on what is negotiated in the contract. Tr. 406:17-21.

The ALJ failed to provide any reasoning for crediting Ms. Ngezem's testimony that Ms. Ninan stated that current terms and conditions *would* change instead of Ms. Ninan's testimony that she stated that terms and conditions *may* change. *See* JD 12:13-23, fn. 40. Therefore the ALJ's credibility determinations should be overturned and this finding of violation should be rejected.

F. The ALJ Erroneously Concluded that Officer Hawkins Coercively Interfered with Nurses' Union Activities and Interrogated Nurses on October 19, 2016.

The Board should overturn the ALJ's conclusion that by attempting to intimidate and disperse a group of nurses who had been discussing Union activities, Officer Hawkins coercively interfered with the nurses' union activities and interrogated them. JD 21:25-30.

The cases in which the Board has held that security officers' actions at issue constitute coercive interference are based on facts which are patently distinguishable from the facts in this case. *See supra* at 36-39. The case cited by the ALJ, *St. Johns' Health Center*, 357 NLRB 2078 (2011), contradicts a finding that Officer Hawkins coercively interfered with union activity. In *St. Johns' Health Center,* the Board held that security officers, who were acting under direct authority from upper management, violated the Act by threatening to have employees arrested for trespassing for distributing pro-union literature and refusing to leave the premises after instructed to do so. *Id.*; *see also* JD 21:28-30.

There is no evidence that Officer Hawkins threatened to charge anyone with trespass, instructed the nurses to cease activity or leave. In fact, the nurses remained in the corridor and continued their conversation. Tr. 500:17-18. The exchange was isolated and lasted a matter of seconds.

It is obvious that because no actual interference took place, the ALJ falls back on Officer Hawkins' alleged intent to interfere. The ALJ states, "though Hawkins did not succeed in halting the union activity – because the nurses pushed back – his intent had been to stop any Union discussion and disperse the nurses." This reference to intent, however, is not part of the 8(a)(1) analysis. *Cannon Electric Company*, 151 NLRB 1465, 1468-69, fn. 6 (1965) ("No proof of coercive intent or effect is necessary"). The ALJ's reference to intent demonstrates that the ALJ reached his conclusion based on inappropriate law.

There is also no record evidence that management directed Officer Hawkins to approach the nurses. *See* JD 21:28-29. To the contrary, the ALJ found that Hawkins "already knew from management's instructions that discussion about the Union was permitted in non-patient treatment areas." JD 13, fn 42. The ALJ's finding that management instructed Hawkins to allow discussion in that area rebuts the contention that Hawkins acted under the Hospital's direction when he approached and the nurses if they were having a union meeting.

The ALJ credits Ms. Scott's and Ms. Mintz's testimony in concluding that Officer Hawkins engaged in interference and interrogation. Both of these nurses testified that they continuously solicited, discussed the Union, and engaged in other union activities throughout the campaign. Tr. 96:6-10; 100:3-6; 296:24-299:21; 305:20-23; 316:14-317:6. Their continuous and open advocacy contradicts the finding that Hawkins' question "coerced [them] to an extent that [they] would feel restrained from exercising their [Section 7 rights]." JD 21:34-37.

For this reasons, the Board should overturn the ALJ's conclusion.

G. The ALJ's Miscellaneous Factual Errors En Masse Are Significant And Warrant The Board's Attention.

The sheer number of factual errors contained in the ALJ's decision indicate that this was a rushed and ill-considered decision. These errors en masse show that the ALJ failed to adequately review the record and briefs, and warrant a close review by the Board. The errors are below.

1. The ALJ erred in finding that Ms. Mintz went to the Operating Room on March 21, 2017 to solicit and hand out box lunches to the nurses there during break time. JD 5:34-35. There is no record evidence that Ms. Mintz went to the OR. Tr. 42-109. Ms. Scott, however, testified that she solicited nurses in the OR lounge. Tr. 317:13-24. The ALJ's confusion of testimony warrants a closer look at his decision.
2. The ALJ erred in finding that on August 6 several nurses, including Ms. Mintz, posed for a group photograph. JD 6:16-17. The incident that the ALJ is referring to occurred on September 15, not August 6. Tr. 150. Also contrary to the ALJ's finding, Ms. Mintz was not present for the photograph and nothing in the record supports that.
3. The ALJ erred in finding that Ms. Mintz and Ms. Scott did not enter the locked 5 South unit on August 6, 2016. JD 9:14-17. Ms. Scott admitted that they followed the Unit Coordinator into the locked unit and then realized "it was not a good idea" and left to wait in the waiting area outside of the unit. Tr. 264:12-17. This erroneous finding forms the basis for the ALJ's rejection of the Hospital's defense that it had a legitimate reason for calling security, i.e. that individuals had entered a patient care unit asking to speak to a nurse engaged in patient care. JD 20:22-33.
4. The ALJ erred in stating that the Hospital managers included "Sylvia" Guarino.[18] JD 3:9-10. This suggests that the ALJ did not review the transcript of record.

[18] As stated in the record, the Chief Nursing Officer is Celia Guarino. Tr. 54:23-24.

5. The ALJ erred in finding that Ms. Guarino distributed fact sheets *by fax*. JD 6:33-35. (Emphasis added). No record evidence supports this finding. Tr. 86:16-19.
6. The ALJ erred in finding that NIC Michelle Jones' statement to nurse Marianne Wysong that "the Hospital had always taken care of her and a union was unnecessary" is evidence of "department supervisors" enforcing aspects of the Hospital's solicitation and distribution policy. JD 5:23-32. It is unclear how the cited statement is evidence of a supervisor enforcing the Solicitation Policy.
7. The ALJ erroneously found that the in-unit hallways connecting patient rooms and areas surrounding the nurses' stations are "general public-access areas" and that these hallways are frequented by everyone in the Hospital. JD 3:1-9. The ALJ made this finding after stating that "restricted areas include the Hospital units themselves, many of which require a Hospital-issued badge to enter." *Id.* How can units that are "restricted areas" and that require badge-access be considered "general public-access areas"? There is nothing in the record that supports this. The ALJ's reasoning that if patient is allowed on to a locked unit for patient care then the hallway in the locked unit transforms into a public access area is flawed. The public is not allowed on locked units, only patients and visitors with a bona fide reason (e.g. patient care) for being admitted on to the unit are allowed in these areas. Ms. Mintz's testimony, which the ALJ relies on, contradicts his finding.

> 8 Q. Is there a hallway outside those patient rooms?
> 9 A. Yes. There is a long, wide hallway.
> 10 Q. Who uses the hallway?
> 11 A. Parents of the patients, doctors, nurses, ancillary
> 12 staff who come through, visitors, everybody.
> …
> 17 Q. So if you're on a stairwell, if you want to get onto the
> 18 NICU unit, do I have -- does somebody have to badge in; is

19 that what you're saying?
20 A. *Yes. You couldn't be just a visitor. You could not*
21 *take the stairwell and get onto our unit because it's a*
22 *locked unit. You would have to have a badge in order to get*
23 *from the stairwell to the space.*

Tr. 49:8-23.

8. The ALJ erred in finding that that the fifth floor of the Hospital is broken into two departments 5 South and 5 East, and that Aieun Grace Yu and Vera Ngezem were both acute care RNs stationed on the fifth floor. JD 2:23-25. The fifth floor of the Hospital houses the 5 East and 5 West units, and there is a separate new tower that is where 5 South is located. Tr. 44:13-45:5, 58:17-62:2. Ms. Yu works on 5 South, and Ms. Ngezem works on 5 East – in separate buildings and different floors. *Id.*; 146:19-24.
9. The ALJ erred in finding that "Vernado" was a special police officer. JD 3:14. There is no record evidence that he was a special police officer as he did not testify, and the correct spelling of the officer's name is "Varnado." Tr. 479:14.

The number of errors is significant because it is evidence that the ALJ did not review the transcript of record or the parties' briefs and as a result this decision contains factual and legal errors that are independent bases for overturning the decision and order.

V. CONCLUSION

For the foregoing reasons, the Board should find merit to the Hospital's exceptions and should reverse his findings and conclusions that the Hospital violated the Act.

Dated: August 18, 2017

Respectfully submitted,

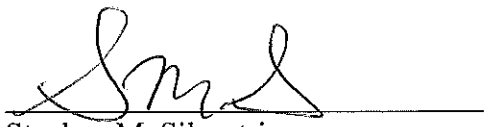

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EXHIBIT A

From: Rosas, Michael A <Michael.Rosas@nlrb.gov>
Sent: Monday, July 17, 2017 9:57 AM
To: Keough, Brendan; Silvestri, Stephen M. (Baltimore); Leyh, Chelsea B. (Baltimore); Jonathan Harris
Subject: FW: Efiling
Attachments: MOT.05-CA-182154.Counsel for General Counsel_s Motion to Strike Portions of Respondent_s Brief to the Administrative Law Judge.pdf

Counsel, the briefs and have been considered and decision is essentially completed. To save everyone more work and allow you to enjoy more of your summer, the following footnote has been added to the "On the Record" reference preceding the findings of fact:

The General Counsel's Motion to Strike Portions of Respondent's Brief to the Administrative Law Judge, served July 13, 2017, essentially amounts to a post-hearing reply brief, which is not permitted under Board rules. Also, to the extent that the motion includes a request for reconsideration of certain evidentiary rulings, that application is also denied."

Michael A. Rosas
Administrative Law Judge
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
Tel. (202) 501-8633

From: Brown, Barbara
Sent: Monday, July 17, 2017 8:37 AM
To: Rosas, Michael A <Michael.Rosas@nlrb.gov>
Subject: Efiling